

PROMOTING HUMAN RIGHTS VALUES IN CUBA'S POST-CASTRO MILITARY

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INTRODUCTION

*"Laws and institutions must go hand in hand with the progress of
the human mind."*

Thomas Jefferson

Every country in the Western Hemisphere has made progress, in some cases significant progress, in embracing the rule of law³ and associated principles in the establishment of liberal democratic systems of government—except Cuba. In this context, most nascent democracies have recognized that establishing a professional law-based military that respects internationally recognized human rights⁴ and is subordinate to civilian control is absolutely integral to the legitimacy of the government and to the basic stability of the nation. As we approach the dawn of the next century, many now wonder whether Cuba might also stand at the door of major political and social changes, and whether the Cuban military can make the necessary transition to serving a democratic government.

Indeed, after forty years under a brutal regime supported by a totalitarian military, para-military, and police internal security apparatus, thoughtful students of history can hardly fail to pose the question, what will

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3. The most common meaning for the rule of law is directly associated with all those rules and legal standards of behavior recognized and practiced between States in the context of the community of nations. For an excellent discussion, see JOHN NORTON MOORE, *LAW AND THE GRENADA MISSION 1* (1984). Professor Moore states: "Law, however, is vitally important. Even in the short run, law serves as a standard of appraisal for national actions and as a means of communicating intentions to both friend and foe, and perceptions about lawfulness can profoundly influence both national and international support for particular actions."

4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS § 702 (1987).

happen when Castro is gone? The central issue is whether the nation will embark on the road to true liberal democracy or settle for a continuation of the status quo under another dictator.⁵ No one can predict the future with absolute certainty, but a single factor seems clear above all others. As was the case with the people of the former Soviet Union, the yearning for fundamental human rights and democratic freedoms so long repressed in Cuba will streak across the horizon with the brilliance of a long anticipated comet. One can only hope, then, that the establishment of a government committed to the rule of law is the end towards which the onward march of Cuba's history is directed.

Accordingly, should a fledgling post-Castro democracy actually emerge in Cuba, a critical goal for the Cuban people, their government, and the United States, should be to restructure quickly the former totalitarian military so that it will support, rather than hinder, liberal democratic reforms in Cuba. If a new Cuban democracy is to stabilize and flourish, subordinating the military to civilian control befitting a democratic system in which the soldier can carry out his mission in accordance with internationally recognized human rights principles is absolutely essential. In a liberal democracy, the military cannot be an independent actor; it must take directions from the civilian government and be accountable to society for the way it carries out those directions.

The focus of this monograph concerns the applicability of human rights to the conduct of military actions. Civilian control over the military alone does not guarantee a liberal democracy where all citizens and residents of a nation are guaranteed fundamental rights and protections. For purposes of this paper, a distinction is drawn between "democracy" and "liberal democracy." The former defines a system of government in which the majority rules. The latter implies that although the majority rules, certain fundamental individual human rights, such as those found in the Bill of Rights of the U.S. Constitution, are guaranteed to all citizens, and the majority may not infringe upon those rights. Under a liberal democracy, minorities are protected from the possible tyranny of the majority.

The brutal and illegal atrocities that have plagued the former Yugoslavia, committed by some segments of the Serbian army and police in Croatia, Bosnia and most recently Kosovo, represent some of the most egregious violations of international human rights since World War II. Yet, the Yugoslav army and national police acted under orders of a civilian government duly elected by the Serbian people. Thus, a non-liberal democratic government that exercises civilian control over the military, alone, without a commitment to human rights, will not deter abuses against the weakest members of society.

What can the United States do today to prepare to assist a post-Castro Cuban military transition from being an instrument of a brutal, totalitarian dictator to a protector of human rights? The *thesis* of this paper is that *the United States should develop a specific plan to take advantage of the expected opportunity to promote human rights values in Cuba's post-Castro military.*

5. Juan O. Tamayo, *Castro's Vision Has High Price: Democracy*, MIAMI HERALD, Dec. 27, 1999, at 1A.

The paper will also demonstrate that U.S. military judge advocates⁶ are uniquely qualified to execute this plan and assist the post-Castro Cuban military to internalize respect and protection of human rights as part of its fundamental reason for existence.

The paper is divided into four major parts: Historical Context; International Human Rights Law; U.S. Military Efforts to Promote Human Rights in the Post-Cold War Era; and Human Rights Training for the Post-Castro Cuban Military. The first part provides the reader with background concerning Castro's Cuba in general and the use of the Cuban military as an instrument to maintain power. It also summarizes U.S. policy towards Cuba over the past forty years in order to help the reader appreciate the highly charged domestic political context in which possible United States-Cuba military-to-military contacts would take place. Although Americans, especially Cuban-Americans⁷, agree on the goal, (i.e., removal of Castro and the establishment of a liberal democracy in Cuba), they are radically polarized concerning the strategy. The U.S. domestic politics of providing any kind of assistance to Cuba, even after Castro is gone, is guaranteed to be emotional.

The second part of this paper provides the reader with a basic primer on international human rights law. The third part introduces the reader to the United States military's nation-building roles and missions, specifically pertaining to the promotion of human rights values by judge advocates in foreign militaries, in the post-cold war era. A successful case study for the promotion of human rights in the Peruvian military in 1993 is used to illustrate the potential use of U.S. judge advocates in a post-Castro Cuba.

The fourth and final part of the paper specifically addresses the promotion of human rights in Cuba's post-Castro military. First, a brief discussion concerning the chances for the Cuban military to honestly seek a new direction following Castro's departure is presented. The paper will then offer seven specific recommendations to serve as a guide for the formulation of a plan to promote human rights values in the Cuban military. The point will also be made that it will require strong, honest, and intelligent commitments from the Cuban, as well as the American, civilian and military leadership.

6. U.S. military judge advocates are lawyers licensed to practice in one of the U.S. states or federal territories. Between the three services and the Marines, there are over 4000 judge advocates serving on active duty in the U.S. military.

7. Over 1,000,000 Cubans sought refuge in the United States since the 1959 communist revolution, most obtaining United States citizenship, and for obvious reasons, most showing interest and voicing concern about U.S. policy and strategy towards their land of birth.

PART I HISTORICAL CONTEXT

Castro's Cuba

*"El que oprime la isla esclava."
(He who oppresses the enslaved island.)*

Cuban Idiom for Castro

Cuba is the largest island of the West Indies Archipelagos and is approximately 44,218 square miles in size. In 1492, Christopher Columbus discovered and claimed Cuba on behalf of Spain. In 1511, the Spanish Crown established the first permanent settlement. Cuba remained firmly under Spanish rule for over 400 years until it gained its freedom in 1898, culminating in the Spanish-American War.⁸ A democracy-based Cuban Constitution was immediately adopted and was replaced with a new one in 1940. Cuba, not unlike many Latin American nations, enjoyed periods of authentic liberal democratic government, interrupted by periods of dictatorships, from 1901 to 1959. On December 31, 1958, the dictator of Cuba, Fulgencio Batista, was forced to flee the island following a protracted campaign for liberal democratic reforms conducted by numerous civil rights groups, culminating in a two-year guerilla war led by Fidel Castro and his followers.

On January 1, 1959, Castro took power by force, and by 1960 he had, through threats, deception, civil rights abuses, and murder, consolidated his power and established firm political and economic relations with the Soviet Union. The Cuban army, comprised of his guerilla followers, played a critical role in his ruthless campaign of terror. Relations with the United States were terminated following the Bay of Pigs incident, which occurred on April 17, 1961.⁹

While it is true that Castro took power in Cuba through violent revolution, he did so, at least initially, with the overwhelming support of the Cuban populace and without significant external support. Since then, Fidel Castro has been able to successfully fashion a broadly based nationalistic agenda cemented around himself, as dictator, and the "Revolution."

There are three major ethnic groups in Cuba's population of 11 million. Cubans are categorized as 51 percent mulatto, 37 percent white, 11 percent black, and 1 percent Chinese origin. Religious freedom and practices are reemerging in Cuba, with a majority of Cubans identifying themselves with Roman Catholicism. Due to the potential for opposition to his regime, however,

8. After several failed attempts for independence, the Cuban anti-Colonial revolutionaries finally succeed with the aid of the U.S. Navy. The U.S. Navy destroyed the Spanish Navy, thus cutting the supply lines from Spain to its troops in Cuba.

9. The Bay of Pigs refers to the April 17, 1961, ill-fated attempt by the U.S. to overthrow the Castro regime. The U.S. assisted an armed force of Cuban exiles to establish a beachhead in the Bay of Pigs, which was quickly defeated and captured.

Castro has been generally opposed to religion.¹⁰ Nevertheless, social reform has always been a centerpiece of revolutionary propaganda. Heavily influenced by a state-controlled media, most Cubans believe that the quality of life on the island is better than their neighbors. To be sure, the basic literacy rates are relatively high for this Spanish-speaking people. In addition, progress in health and education since Castro came to power have been fairly impressive, although both categories have suffered significant deterioration since the early 1990's.

For much of its existence, Fidel Castro's Cuba has served as one of the most conflictive spots on the planet. A totalitarian regime born out of the Cold War between the Soviet Union and the United States, the small island of Cuba performed dutifully for almost thirty years as a centerpiece of Marxist-Leninist ideology and as a front line outpost for communist expansionism. Not only was Cuba the scene of the Cuban Missile Crisis, which brought the world to the brink of nuclear war¹¹, but the Cold War also witnessed the Bay of Pigs incident and the use of Cuban combat troops in such faraway places as Angola in 1975, and the Horn of Africa in 1977-78.

With the total collapse of the Soviet Union and the attendant loss of massive Soviet subsidies which had allowed Castro to provide basic material needs to the Cuban people (Cuba was receiving a \$5-6 billion annual Soviet subsidy), many in the free world had expected Castro's speedy demise and the rapid dismantling of communism in Cuba. Although the loss of the Soviet Union has denied Castro the capability to foment actively and support "wars of national liberation,"¹² Fidel Castro and his communist elite remain firmly in control of Cuba. In short, Castro's efforts to foster subversion in neighboring governments may have declined, but his hold on power in his own country is as strong as ever. To date, he has proved to be far more resilient than many policy makers had ever imagined. He has accomplished this, if nothing else, by demonstrating a masterful use of the international media. Fidel Castro has certainly shown himself to be one of the most crafty politicians of the 20th century.

Despite occasional signals which hint at some form of subtle repositioning, such as Pope John Paul II's much publicized visit in January 1998, most observers believe that Cuba will remain firmly clenched in Castro's dictatorial hands.¹³ Vowing that he will not "be a Gorbachev," few doubt the fact that Castro intends to maintain strict control of Cuba for as long as he lives. Castro will not leave office voluntarily or accept any diminution of power such as, handing over power to a transitional government.

With the spread of liberal democracy throughout Latin America and the Caribbean, Fidel Castro now stands as the last dictator in the Western Hemisphere. However, it seems certain that Castro is not only determined to

10. *Cubans Meet their Liberator*, MIAMI HERALD, Jan. 23, 1998, at 13A. Castro has endorsed a "revolution against God."

11. See Proclamation No. 3504, 27 Fed. Reg. 10401 (1962). On October 23, 1962, President John F. Kennedy ordered the interdiction by U.S. forces of the delivery of offensive weapons to Cuba by the Soviet Union.

12. See GERHARD VON GLAHN, *LAW AMONG NATIONS* 163 (1986).

13. See *Pope's Visit Changes Little in Cuba*, MIAMI HERALD, June 26, 1998, at 17A. Following the Pope's visit, Castro has largely ignored the Pope's call to allow greater religious freedom.

stay in power during the full span of his own life, but he also earnestly desires to somehow continue the totalitarian system after his death. To this end, Fidel Castro has named his brother Raul as his successor and has appointed other party loyalists to carry on the Revolution.

Castro's greatest vulnerability probably lies in the continued weakness of the island economy. With living standards continuing to drop and social services deteriorating as well, his gamble is that the economic situation will stabilize without the loss of political control. Thus, in order to foster steps for the continuation of the Revolution, Fidel Castro has been forced to undertake some limited changes in the classic centralized model of his communist economy. Expressing an admiration for the "Chinese model," the Cuban dictator has embraced, in theory, a policy of economic reform without engaging in a political reform.

On the other hand, Castro has made it crystal clear that regardless of economic or social hardships visited on the Cuban people, he will not hesitate to use the regime's powerful military and other internal security forces to repress any and all opposition. Indeed, both during the Cold War period and extending to the present, it has been Castro's authoritarian military and police forces which have kept him and the Communist Party in power. Like all totalitarian regimes, Cuba's revolutionary leader ensures his continued survival by relying heavily on his military and police forces to run an incredibly sophisticated and repressive apparatus, which currently holds 3,000 to 4,000 political prisoners according to Freedom House and around 600 prisoners of conscience, according to Amnesty International.¹⁴ In terms of its overall human rights rating ending in 1998, Freedom House codes Cuba as "not free," the lowest possible rating.¹⁵

One need only read Article 62 of the Cuban Constitution to understand what is the most important value to Castro's regime, "[n]one of the freedoms which are recognized for citizens can be exercised contrary to . . . [the] decision of the Cuban people to build socialism and communism." In other words, Castro's vision of what is best for the nation or for himself is paramount to the freedoms of the Cuban people. The "ends justify the means" declares this constitutional article.

The Cuban Military - Castro's Instrument of Control

*"Cuba today [1998] is reminiscent of the Soviet Union under Josef Stalin."
Eastern European diplomats remarks to U.S. Congressional Staff*

The two dominant institutions in Castro's Cuba are the Communist Party and the Armed Forces. Both have been successfully used by Castro to maintain his iron grip on the island for over four decades. The Cuban Communist Party provided the "brains" of Castro's dictatorship. It ensured that

14. *Cuba at the Crossroads, The Visit of Pope John Paul II & Opportunity for U.S. Policy: Staff Report of the U.S. Senate Committee on Foreign Relations and U.S. House of Representatives Committee on International Relations*, MIAMI HERALD, Mar. 4, 1998, at 15.

15. Roger Doyle, *Human Rights Throughout the World*, SCI. AM., Dec. 1998, at 30-31.

the Marxist-Leninist ideology permeated every aspect of life on Cuba, which placed Castro in the unquestioned position of founder, leader, and protector of the "Revolution." The military provided the ultimate "muscle" for Castro, ensuring that no one would even dare dream of replacing him as the head of the Revolution.

The Communist Party of Cuba (Partido Comunista de Cuba) claims approximately 750,000 members. Fidel Castro holds the position of the First Secretary of the Communist Party as well as the President of the Council of State and the President of the Council of Ministers. Not surprisingly, there are no legal opposition parties in Cuba and, as a practical matter, Castro and a close circle of senior government advisors make all major policy decisions. In fact, although delegates to the Communist Congress are elected, they meet only once every five years to provide rubber-stamp approval for the policies of the Castro regime. With the collapse of the Soviet Union and Marxist-Leninism, the influence of the Cuban Communist Party has declined significantly. The illogical, false, and farcical rationale that the party provided to legitimize Castro's hold on power (i.e., that the Cuban Revolution was part of a worldwide communist revolutionary movement for the benefit of mankind) has long since disintegrated. As a result, Castro must now rely increasingly on the "muscle" of his regime to hold on to power.

There are three main branches of service in the Cuban military: the Army Ground Forces (DR), the Navy (MGR), and the Air and Air Defense Forces (DAAFAR). In turn, the active ground forces are divided into three regional sections across the island: the Western, the Eastern, and the Central. The mission of the Western force, the largest of the three, is to defend the cities of Havana and Pinar del Rio. The Eastern force is directed toward the U.S. Naval Base Guantanamo and the eastern portion of the island. Finally, apart from defending the central portion of the country, the Central force is tasked with providing reinforcements as needed.

The active military forces are supplemented by auxiliary organizations such as the Youth Labor Army (EJT), the Territorial Militia Troops (TTM), and the Civil Defense and Border Guard forces (TGF). The auxiliary forces consist of both military and civilian personnel and are organized at the local community level. As a matter of fact, the entire country is divided into local civil defense cells that must account for all those eligible for military service. In classic Marxist form, block leaders are responsible for reporting all activities that occur within their block.

Current estimates of the Cuban active military force is between 50,000 to 65,000, with an equal number in the reserves.¹⁶ Whether they are active, reserve, or auxiliary, all forces are under the Ministry of the Revolutionary Armed Forces (FAR). The Commander in Chief of the FAR is Fidel Castro. The number two position of Defense Minister and General of the Army belongs to his brother, Raul Castro, who exercises broad operational control over the military.

16. *The Cuban Threat to U.S. National Security*, Published by the Defense Intelligence Agency pursuant to Section 1228 of Pub. L. No. 105-85, § 1228, 111 Stat. 1943-44 (1997).

The Communist Party of Cuba and the Ministry of the Revolutionary Armed Forces have traditionally been tightly linked to one another with the Communist Party active at every level of the military. Most of the senior officer corps are members of the Communist Party and the military is indoctrinated in communist ideology. As stated before, with the loss of its financial and political sponsor, the Soviet Union, the relationship between the Communist Party and the armed forces has grown even tighter, with the armed forces gaining power and responsibility.

Since 1991, there has been no question that Castro has been obliged to shift dramatically the focus and mission of his military. Severe resource shortages have forced the military to make deep cuts in personnel, training, and equipment. According to a recent Defense Intelligence Agency report, the FAR has been transformed from "one of the most active militaries in the Third World into a stay-at-home force that has minimal conventional fighting ability."¹⁷ From its prestigious heyday of a well-armed combat force of almost a quarter million personnel, the active forces in Cuba are a mere shadow. Economic hardships have forced not only the reduction in forces, by many of the traditional fringe benefits, such as housing, pay, and recreation facilities have simply evaporated. Although Cuban law mandates that all eligible males must serve in the military or military reserves for eighteen months, economic hardships make this law problematic. Avoidance of fulfilling the associated military training requirements for those assigned to the reserves appears to be fairly widespread.

The traditional Castro-directed mission of defending the island and providing military assistance to foreign communist countries including the deployment of combat troops to support "wars of national liberation,"¹⁸ has dramatically shifted to a new focus. In short, the new mission for the FAR is nothing less than to maintain the economic, social, and political stability of the Castro regime.

Curiously, this inward mission has witnessed the military actually take over much of the social and economic activities in the civilian sector. Turning to the Communist Chinese model, a large portion of the Cuban military is now heavily engaged in agriculture and manufacturing, not only producing food and goods for its own consumption, but selling these items to the general public at a profit. For instance, the Cuban air force even owns and operates the Cuban tourist airline, Gaviota, while the army runs the sugar industry.¹⁹

The most disturbing use of the FAR is its service as the ultimate institution to snuff out the exercise of individual human rights in Cuba. When called upon, the military assists the police forces in a wide variety of law

17. *Id.* at 1.

18. See, e.g., JOHN NORTON MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987).

19. It is not uncommon for militaries in Latin America and Eastern Europe, at national and unit level, to engage in commercial enterprises to generate income. The difference between Cuba, which follows the communist Chinese model, and the aforementioned militaries, is that in Latin America and Eastern Europe, the militaries generate products, services and income for their benefit, to make up the shortfalls between appropriations and operational expenditures. In Cuba, the military plays a critical role in the agricultural, industrial, and commercial life of the nation, not to support itself, but to support the revolution and Castro. The relative roles do not compare.

enforcement activities, including the prevention of free assembly, and free speech, and the enforcement of prison-like security to prevent citizens from escaping the captive island. Dramatic episodes, such as the Cuban military shooting down two unarmed civilian aircraft, which killed all four U.S. citizen occupants in 1996, and sinking a boat loaded with Cubans seeking to escape the prison island, which drowned 42 people, including 21 children, in 1994, received international media attention. Less publicized, however, is the use of the military to snuff out spontaneous expressions of free speech and free assembly by the Cuban people. Recently:

Troops sealed off a harbor in northeastern Cuba on Wednesday [July 7, 1999] to keep rowdy crowds from witnessing a standoff between Cuban forces and a dozen men and women apparently bent on fleeing the island in a boat, residents of the area reported. About 1000 people gathered around the Puerto Padre harbor at the start of the incident Tuesday, with some chanting 'Freedom!' and others using dinghies to deliver food and water to the occupants of the stranded vessel, the witnesses said. The unusual gathering (assemblies not arranged by the government are rare in Cuba) marked the third time this year that large crowds have rushed to Cuban ports amid reports of illegal escapes toward South Florida. The whole town had lined the harbor to support the group yesterday [Tuesday, July 6, 1999] by 1 p.m., but everyone went home at night, and this morning the soldiers had closed off all the roads, said a woman who lives near the harbor.²⁰

Military officers from Latin American nations that have had some contacts and interactions with the Cuban military report that the Cuban military provides some nominal instruction in the Law of War and Human Rights.²¹ The training, these officers state, is very limited and rudimentary even by Latin American standards. In view of the fact that Castro uses the military to guarantee the continued existence of his communist regime in violation of fundamental human rights, it may be fair to conclude that the minimal human rights instruction provided to the military serves only as "window dressing" for the benefit of the international community.

U.S. Policy Towards Castro's Communist Regime

"Each generation gives birth to its own tyrants."

Winston Churchill

The United States and the American people, especially Cuban-Americans, all agree that Castro must go as soon as possible. As a practical

20. *Boat Trying to Flee Cuba Draws Crowd*, MIAMI HERALD, July 8, 1999, at 1.

21. This information, while very sketchy and unsubstantiated by direct evidence, was obtained during various conversations between the authors and high-ranking military officers from armies in South and Central America.

matter, there is probably very little that the United States can do in the short-term to push Castro out of power. No one expects a Bay of Pigs-styled invasion. Over the long-term, there are two views concerning how the United States should pursue its goal of removing Castro from power and helping the Cubans establish a liberal democracy. One view calls for isolation of the island and the other for liberalization of contacts. Although both views desire the same goal, they are diametrically opposed as to how to achieve that goal.

The traditional isolation policy, which is the only policy that has been followed since 1960, holds that the United States should ostracize Castro to the greatest extent possible, economically, politically, and socially. The 36-year old trade embargo and the 1996 "Helms-Burton Act"²² underscore this view.

The opposing view claims that the United States should open up to Cuba to the greatest extent possible. Influential advocates of a liberalization policy towards Cuba include many serious observers, such as human rights activist Elizardo Sanchez, head of the Cuban Commission for Human Rights and National Reconciliation,²³ Professor Alberto R. Coll, the United States Naval War College, and the New York Times.²⁴ Professor Coll believes the U.S. embargo, as codified in the Helms-Burton legislation, should be lifted. Like others, Professor Coll is in favor of creating as many contacts as possible with Cuba in order to facilitate the transition to democracy once Castro departs the stage.²⁵ Other opponents to the current isolation policy believe the embargo and travel ban only serve to hurt the Cuban people, not the elite communist party members. By lifting the embargo and encouraging U.S. business contracts, they argue, the communist system would be weakened and the inevitable transition to a liberal democracy would be greatly accelerated.

Those who hold to the current U.S. embargo position strongly disagree with liberalization tactics.²⁶ The Vice Chairman of the Cuban-American Military Council, Jose A. Miro Torra, for example, points out that Castro is far too sophisticated to allow tourism and U.S. investment to undermine the communist system. Instead, if full liberalization occurs, Castro could be expected to manipulate the influence of capital investment so that it benefitted the businesses owned by the members of his direct power base or the Cuban government and not the Cuban people. Furthermore, lifting the embargo may actually cause the regime to become more repressive, either over fears that the communist party might be weakened or that black-marketing by "Mafia" style

22. The "Helms-Burton Act" is the popular name used to refer to the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021 (1996).

23. Juan O. Tamayo, *Activist: Give Cuba A Chance*, MIAMI HERALD, July 10, 1998, at 1.

24. *N.Y. Times Recommends Ending Embargo of Cuba*, MIAMI HERALD, Nov. 16, 1998, at 11A. "Arguments justifying the embargo on the basis of Castro's close military cooperation with the former Soviet Union became obsolete a decade ago."

25. Professor Alberto R. Coll, Address at the U.S. Southern Command's 1998 Symposium on Defense and Security Issues (Apr. 21, 1998).

26. Daniela Deane, *U.S. Loosens Restrictions to Help Cubans, Not Castro*, USA TODAY, Jan. 6, 1999, at 6A. The Clinton Administration has slightly relaxed the embargo, although there has been no fundamental change.

organizations might proliferate.²⁷ Whatever the case may be, the question which most concerns supporters of the embargo is, what would be the political ramifications associated with an easing of sanctions? As University of Miami Professor of history and international studies Jaime Scuhlicki argues, lifting the embargo would "[n]egate the basic tenants of U.S. policy in Latin America, which emphasize democracy, human rights, and market economies."²⁸ Specifically, it would send the wrong message to future dictators:

[T]hat a foreign leader can seize U.S. properties without compensation; allow the use of his territory for the introduction of nuclear missiles aimed at the U.S.; espouse terrorism and anti-U.S. causes throughout the world: and that eventually the U.S. will "forget and forgive" and reward him with tourism, investments, and economic aid.²⁹

Although the U.S. embargo has had little effect on the communist elite and actually provides Castro with a convenient excuse for blaming the failed communist run economy on the United States, many argue that the embargo serves as a powerful international symbol of opposition to Castro and oppression and must be maintained at all costs.

Regardless of whether or not the embargo will be eased or lifted in the years ahead, productive steps can be taken now to take advantage of the anticipated window of opportunity that will most certainly open once Castro is gone.

The thesis of this paper argues that chief among such steps is the need to develop a plan of action specifically tailored to assist the post-Castro Cuban military to enact immediate reforms in the context of creating a law-based military that is respectful of internationally recognized human rights. If the United States desires to take advantage of the anticipated window of opportunity, it is imperative that a detailed plan of action to accomplish this goal be developed, approved, and resourced. Before examining this action plan, however, it is necessary to explore fully the concept of human rights *vis à vis* the totalitarian regime.

27. Interview with Jose A. Miro Torra, Vice Chairman of the Cuban-American Military Council, in Miami, Fla. (July 16, 1998). The Cuban-American Military Council is an organization of Cuban American military personnel who have honorably served in the U.S. Armed Forces, the Assault Brigade 2506 (Bay of Pigs), the Cuban Revolutionary Armed Forces (FAR), and the Cuban Constitutional Armed Forces. These former soldiers are dedicated to the goal of "putting together a highly qualified military cadre that can be trained and organized to professionally assist the Cuban people and the FAR as soon as the democratic transition [in Cuba] begins."

28. Jaime Suchlicki, *Lifting Cuba Ban is a Risky Idea*, MIAMI HERALD, May 3, 1998, at 6L.

29. *Id.*

PART II

INTERNATIONAL HUMAN RIGHTS LAW

"The trouble with man is twofold- he cannot learn those truths that are too complicated and he forgets those truths that are too simple."

Rebecca West

No concept has done more to rubricate positive change in the social and political spheres of human experience than human rights. Not only has human rights emerged as a significant moral and legal force in modern domestic and international relations, human rights has increasingly served as the basis for reaching consensus on defining the fundamental pillars upon which all "just" governments should rest. As the Preamble to the Universal Declaration of Human Rights asserts, human rights serve "as a common standard of achievement for all peoples and all nations."³⁰

In its most comprehensive meaning, human rights encompasses all those principles and concerns associated with ensuring respect for the inherent dignity of the individual human being. Indeed, in this sense alone can individuals ever be thought of as "equal" since each human being, regardless of his abilities or handicaps, possesses the same right of respect for his person and property. What then is the current corpus of human rights and how much of it falls into the category of recognized international human rights law? Scholars view human rights as chronologically evolving in "generations" and have identified three such generations.

The first generation of human rights deals with the individual's right to be secure in the most sacred asset of all- his person. All nations are bound by treaty and customary international law³¹ to observe this basic protection which stands as the most fundamental precept of international human rights. Specifically, a state violates international human rights law if, as a matter of state policy, it practices, encourages, or condones seven types of actions:

- (1) genocide;³²
- (2) slavery or slave trade;³³
- (3) murder or causing the disappearance of individuals;³⁴

30. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (1948).

31. A state may express its consent to be bound by a treaty in a number of fashions: (1) ratification; (2) accession; or (3) a declaration of succession. Even absent consent, however, when a norm or standard of practice has reached widespread acceptance in the international community, it is said to have passed into the realm of customary international law. The derivation of customary principles of international law comes from observing past uniformities among nations. Evidence of customary international law may be found in "judicial decisions, the writing of jurists, diplomatic correspondence, and other documentary material concerning the practice of States." *The Paquete Habana*, 175 U.S. 677 (1900).

32. See LEO KUPER, *THE SOVEREIGN TERRITORIAL STATE: THE RIGHT TO GENOCIDE, HUMAN RIGHTS IN THE WORLD COMMUNITY* 56 (1989).

33. See JOHN T. HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* 20 (1989).

34. Center for Human Rights, United Nations, Fact Sheet No. 6, *Enforced or Involuntary Disappearances*, U.N. Doc. GE. 89-15259 (1989).

- (4) torture or other cruel, inhuman or degrading treatment or punishment;³⁵
- (5) prolonged arbitrary detention;
- (6) systematic racial discrimination;³⁶ or
- (7) a consistent pattern of gross violations of internationally recognized human rights.

The second generation of human rights are related to political and civil claims. Unlike the first generation human rights, second generation human rights are only binding on those nations who obligate themselves by treaty or domestic law because no binding customary international law exists at present. Second generation rights are concerned with the individual and his right to be "free from the state in his civil and political endeavors."³⁷ Second generation rights are set forth in the International Covenant on Civil and Political Rights³⁸ and include the broader civil and political freedoms of religion, movement, peaceful assembly, association, expression, privacy, family rights, fair and public trial, and participation in government. These human rights are fundamental to the fullest development of the individual, for without the basic guarantees of freedom, to which these rights speak, the full potential of the individual can never be realized. For those who mistakenly equate human rights with social equality, however, second generation rights present a paradox, as each individual is free to enjoy the consequences of his own decisions without government interference-good or bad.

In contrast to the second generation of human rights, there is no great or growing international movement towards the third generation of human rights. Third generation rights are different from first and second generation rights because they move from restricting governmental behavior *vis a vis* the individual, to mandating that the government perform numerous social and welfare actions for the individual. Third generation rights include such issues as working conditions, social security, education, health care, resource development, food, the environment,³⁹ humanitarian assistance,⁴⁰ and peace.⁴¹

Since the military is a primary institution of a state, it is obligated to fully comply with the first generation of human rights law, and if the state is

35. See MATTHEW LIPPMAN, *THE PROTECTION OF UNIVERSAL HUMAN RIGHTS: THE PROBLEM OF TORTURE HUMAN RIGHTS IN THE WORLD COMMUNITY* 65 (1989).

36. Center for Human Rights, United Nations, Fact Sheet No. 18, *Minority Rights*, U.N. Doc. GE. 91-18616 (1992).

37. Center for Human Rights, United Nations, Fact Sheet No. 16, *The Committee on Economic, Social, and Cultural Rights* (1991).

38. *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1976).

39. See HENN-JURI UIBOPUU, *THE INTERNATIONALLY GUARANTEED RIGHT OF AN INDIVIDUAL TO A CLEAN ENVIRONMENT CONTAINED IN HUMAN RIGHTS IN THE WORLD COMMUNITY* 151 (Richard P. Claude & Burns H. Weston eds., 1989).

40. See Phillip Alston, *International Law and the Right to Food*, in *FOOD AS A HUMAN RIGHT* 162 (Asbjorn Eide et al. eds., 1984).

41. See Katarina Tomasevski, *The Right to Peace*, in HENN-JURI UIBOPUU, *THE INTERNATIONALLY GUARANTEED RIGHT OF AN INDIVIDUAL TO A CLEAN ENVIRONMENT CONTAINED IN HUMAN RIGHTS IN THE WORLD COMMUNITY* 168 (Richard P. Claude & Burns H. Weston eds., 1989).

party to treaties requiring compliance with second (and third) generation human rights, then the military must comply with those as well. In this context, the most troubling aspect is the difficulty of understanding why soldiers, or more precisely, governments, commit violations of internationally recognized human rights. Clearly, this is a critical issue of how to halt gross human rights violations. Objectively, much of what we know about the nature of man comes from the record of his history, a record written in streams of blood. For example, to observe that various governments have engaged in gross human rights violations against their own people describes their behavior, but only partially explains it. In fact, no one has ever satisfactorily explained why certain societies- ancient Assyria, Nazi Germany, Stalinist Russia, Mao's Communist China, Saddam's Iraq, Milosevic's Yugoslavia, or Castro's Cuba- turned into aggressive war machines that committed horrible first generation human rights violations against their own people as well as others.

What has been established are the characteristics of those nations that have a high propensity for engaging in aggressive war and internationally recognized human rights abuses. Professor John Norton Moore, Director of the Center for Law and National Security, University of Virginia School of Law, points out that totalitarian regimes are considerably more likely to resort to such aggressive violence than democracies. Professor Moore terms this phenomenon the "radical regime" syndrome.

A radical totalitarian regime . . . seems to blend together a mixture of a failing centrally planned economy, severe limitations on economic freedom, a one party political system, an absence of an independent judiciary, a police state with minimal human rights and political freedoms at home, a denial of the right to emigrate, heavy involvement of the military in political leadership, a large percentage of the GNP devoted to the military sector, a high percentage of the population in the military, leaders strongly motivated by an ideology of true beliefs including willingness to use force, aggressively anti-Western and anti-democratic in behavior, and selective support for wars of national liberation, terrorism, and disinformation against Western or democratic interests.⁴²

Recognizing a nexus between the nation that mistreats its own citizens and the nation that fosters aggression against its neighbors, "[b]oth the Preamble and Article I of the United Nations Charter make crystal clear that the framers were under the impression that the unleashing of aggressive war occurred at the hands of those States in which the denial of the value . . . of the individual human being . . . was most evident."⁴³ Furthermore, with the outstanding research of University of Hawaii Professor R.J. Rummel, it is now possible to demonstrate numerically the validity of the proposition that totalitarian regimes are the chief abusers of internationally recognized human rights:

42. JOHN NORTON MOORE, ET. AL., *NATIONAL SECURITY LAW* 77 (1990).

43. RICHARD B. LILLICH & FRANK C. NEWMAN, *INTERNATIONAL HUMAN RIGHTS* 776-77 (1991).

War is not the most deadly form of violence. Indeed, I have found that while about 37,000,000 people have been killed in battle by all foreign and domestic wars in our century, government *democide* [genocide and mass murder] have killed over 148,074,000 million more. Plus, I am still counting. Over 85% percent of these people were killed by totalitarian governments.⁴⁴

So long as Cuba remains under the iron grip of Castro, the Cuban military will continue to support the communist regime at the expense of human rights of the Cuban people. When the long awaited window of opportunity opens, however, the U.S. must be prepared to act quickly to offer assistance to the Cuban military to learn, train and internalize Human Rights values. The central question is how best to quickly instill solid internationally recognized human rights values in the military. Furthermore, such values become solid and irreversible only through the development of institutions designed to promote them.

PART III

U.S. MILITARY EFFORTS TO PROMOTE HUMAN RIGHTS IN THE POST-COLD WAR ERA

"No greater disgrace can befall the army and through it our whole people, than the perpetration of barbarous outrages upon the innocent and defenseless. Such proceedings not only disgrace the perpetrators and all concerned with them, but are subversive of the discipline and efficiency of the army, and destructive of the ends of our movements."

General Robert E. Lee

During the Cold War the U.S. military was forced to devote almost all of its resources toward protecting the free world from the aggressive threat of the Soviet empire. The armed forces of the United States provided the military muscle and the political backbone of the Western alliance. As such, the Cold War period was the classic example of the traditional use of military force-combat soldiers trained and prepared to go to war at any moment. The American armed forces were war-fighters, pure and simple. As the Soviet Union began to implode, the free world realized that it was not only the military might of the United States that defeated communism, but also the ideals represented by the United States. It was what Americans have always represented to the world, respect for human rights and freedom. It can be argued that the U.S. military fixed the Soviets in place, but American ideals ultimately caused Soviet communism to disintegrate. In this context, America's most precious asset has always been the export of human rights concerns to the rest of the world. Coupled with a fantastic military force, this is America's

44. R.J. RUMMEL, *DEATH BY GOVERNMENT: GENOCIDE AND MASS MURDER IN THE TWENTIETH CENTURY* 12 (1994).

greatest weapon against those who still seek to wage aggressive war and those who would still deny basic human rights to their citizens.

With these ideals in mind, the U.S. military is now being called upon to engage in new missions that would have been unthinkable just a few short years ago. However, it is important to note that these new missions are not the harbinger of some form of American imperialism. Rather, it is the response of a world hungry for the establishment of institutions that can guarantee the full range of human rights that has given birth to many of the U.S. military's new missions. The promise of a new era where the world strives to be free from the constant scourge of war and human rights abuse demands that the U.S. military expand its traditional role of war-fighter and enter actively into new, non-traditional roles. Indeed, beginning in the late 1980's, the U.S. military has responded by assisting in such areas as drug reduction, disaster relief, humanitarian assistance/peace operations, and nation building.

Because they are viewed as excellent force multipliers, these new missions have dramatically changed the role of the U.S. military. The concern for promoting internationally recognized human rights in general mirrors the overall U.S. national security policy of peacetime engagement by maintaining contacts with allies and friendly governments for the purpose of imparting values and ideals associated with democratic principles.

One of the most far reaching non-traditional roles of the U.S. military is in the realm of nation building. The U.S. military defines nation building as "assisting a host nation in its efforts to restructure, reinforce, or rebuild its formal and informal institutions."⁴⁵ Starting in the 1960's, the U.S. military has been involved in providing nations assistance through the Foreign Assistance Act of 1961⁴⁶ and other Congressional authorities to friends and allies throughout the world. Most of these activities are centered on helping emerging democracies develop the military capability to defend themselves from internal and external aggression. However, in recent years, Congress has also authorized the U.S. military to undertake activities designed to improve the standard of living for the inhabitants of these developing nations. As a result of this specific authority, U.S. military forces have been engaged in numerous humanitarian and civic action projects, such as road building, medical care, well drilling, and minor construction projects.⁴⁷

Many of these activities are conducted during combined military training exercises between the armed forces of the United States and the host nation. The exercises are designed primarily to deter external aggression against the host nation. Thus, the use of these exercises to also combat social and economic problems of the host nation requires careful planning with the host nation government.⁴⁸ The hope for conducting these humanitarian efforts is that by raising the standard of living for the local population, the causes of

45. THE MANAGEMENT OF SECURITY ASSISTANCE, THE DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT 3 (12th ed. 1992).

46. The Foreign Assistance Act of 1961, *as amended*, 22 U.S.C. § 2301 (1993).

47. See, e.g., Humanitarian and Civic Assistance (HCA), 10 U.S.C. § 401 (1994).

48. See Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, ARMY LAW., Aug. 1989, at 4-10.

internal unrest that are associated with conflicts other than war can be curtailed before they start. This concept has reaped tremendous benefits in nations as far apart as Honduras and Thailand.⁴⁹ These engagement missions help promote peace by addressing root causes of regional instability, thus reducing the need for direct intervention. Many argue, however, that in the realm of promoting respect for internationally recognized human rights, such activities do not really go far enough; viable law-based institutions in the militaries of the new democracies are not fostered.

At best, the U.S. military humanitarian missions serve as a conceptual framework for the most promising use of U.S. military personnel in actual nation building missions, that is, U.S. military judge advocates constructing systematic packages to build democracy based institutions in the foreign military. In the post-Cold War era, great advantages rest in instilling human rights values in the military establishments of other nations.

U.S. Military Judge Advocates and the Promotion of Human Rights Values

"Had we a place to stand upon, we might raise the world."

Thomas Paine

The premier hallmark of a successful liberal democracy is the military's acceptance of internationally recognized human rights concerns. In a liberal democracy, the military cannot abuse internationally recognized human rights; it must respect human rights and must be held accountable to civilian authority under a rule of law for the way it carries out its missions. The military must understand that soldiers are not just people who have technical skills and fighting skills, but are citizens who understand their role as a member of an organization with rights and responsibilities in a constitutionally liberal democracy.

In the past, the United States relied heavily on a variety of military security assistance programs in the hopes that basic human rights values compatible with democratic principles might be instilled in various host nation militaries. Since the U.S. effort was geared only at exposing the individual foreign soldier to first and second-generation human rights ideals through lectures and visits, institutional reform within the host nation military never really occurred. Essentially, the promoting of human rights and democracy was an indirect benefit at best, rather than an explicit goal. Now, with the collapse of communism and the emergence of the United States as the world leader, numerous nations from Peru to Ukraine have shown great interest in a more "hands on" U.S. military type of assistance. They wish to establish proper law-based institutions in their military establishments.⁵⁰

49. Jeffrey F. Addicott, *Developing a Security Strategy for Indochina*, 128 MIL. L. REV. 35 (1990).

50. See Jeffrey F. Addicott & Andrew W. Warner, *Promoting the Rule of Law in Militaries of Emerging Democracies*, NAT'L SECURITY L. REP., Mar. 1993, at 1.

The full promotion of democratization in the new democracies involves matters that cannot be assigned to the jurisdiction of any single department of the U.S. government. However, the promotion of internationally recognized human rights in the militaries of the new democracies is best left to the U.S. military's judge advocates. Accordingly, the Defense Department's (DoD) greatest contribution to fostering new democracies is by working to improve the relationship between emerging democratic governments and their militaries by institutionalizing respect for internationally recognized human rights in the armed forces.

The U.S. military legal departments have a central role to play in designing a coherent strategy to promote law-based institutions in the foreign military establishment. Through a variety of U.S. legal assistance programs at least some foreign militaries have been exposed to the two hundred year old U.S. "success story" of how a professional military can maintain a superb combat record while operating under civilian control and in accordance with fundamental human rights concerns.⁵¹ Indeed, the U.S. military is universally recognized and respected as the most efficient, professional, and humanitarian armed force in the world.

Recognizing that the armed forces in non-democratic states have been used as the primary tool of the totalitarian leadership to perpetuate human rights abuses, the major U.S. concern must be to take specific actions that can promote and assist the host nation's armed forces to institutionalize respect for first generation human rights. To do this, the U.S. military has turned to its military lawyers, a uniquely qualified asset for this job.⁵²

From its inception in 1775, the U.S. Army has incorporated legal officers as an integral part of the American military establishment. In the modern U.S. military, all services of the armed forces have officers who serve as military attorneys or judge advocates. In the usual process to become a judge advocate, one must first be an attorney authorized to practice law in one of the fifty states in the United States. Applications are then screened and a certain number of the most highly qualified attorneys are offered a commission in the military. The new judge advocate then completes military legal training at a special military legal training facility before he or she is assigned to his or her first duty station.

In the Army, there are currently just under 1,500 judge advocates ranging in rank from First Lieutenant to Major General.⁵³ These officers are organized into a Judge Advocate General's Corps. Within the Department of Defense, there are also a small number of civilian attorneys that oversee political and legal issues for the civilian leadership of the military.

United States judge advocates serve as an action-based resource capable of advising and responding to a variety of legal problems. Traditionally, judge advocates are tasked to provide support to the U.S. military

51. See e.g., Jeffrey F. Addicott, *Operation Desert Storm: R.E. Lee or W.T. Sherman?*, 136 MIL. L. REV. 115 (1992).

52. See Thomas J. Feeny & Margaret L. Murphy, *The Judge Advocate General's Corps*, 1982-1987, 122 MIL. LAW REV. 4 (1988).

53. Judge Advocates in the other services include: Air Force, Navy, and Marines.

in the context of military justice, military administration, environmental law, labor law, legal assistance, contacts, procurement, international law, law of war, and other areas. In general, the principal function of any judge advocate is to provide advice on legal matters to the commander and his staff, to ensure that all activities are carried out in accordance with U.S. domestic and international law. In turn, commanders and staff officers are well accustomed to soliciting and accepting the advice of their lawyers in all aspects of operation.

The very existence of a Judge Advocate General Corps serves as a way to institutionalize the American commitment to the positive values of military proficiency and ethical integrity. Furthermore, by doctrine, lawyers oversee all of the regulatory requirements associated with providing law of war, code of conduct, and standards of conduct training to all U.S. soldiers.⁵⁴ As a result, few militaries in the history of mankind can match the record of the U.S. military as it has functioned under a rule of law, either in the realm of respecting the law of armed conflict,⁵⁵ providing a fair system of justice for its soldiers, or operating under civilian control.⁵⁶

The new non-traditional roles of the U.S. military have required attendant new demands on the military legal profession. While the U.S. military is shrinking in size, these new non-traditional roles have actually dictated an increase in the amount of legal support demanded of judge advocates. To deal more effectively with the legal issues related to the new military missions, in the late 1980's, the Army Judge Advocate General's Corps formally recognized a new practice of law, encompassing several traditional legal disciplines called "Operational Law" (OPLAW).⁵⁷ When practicing operational law, judge advocates are concerned with legal issues associated with the law of war, security assistance, intelligence law, status of forces agreements, contracting, claims, combined training exercises, humanitarian assistance, civil affairs, peace operations, drug interdiction, training of foreign military legal officers, and other related matters. By its very nature, OPLAW mandates that judge advocates not only deal with operational law issues as they exist, but as a concurrent function, they must be prepared to anticipate future developments in military operations; ensuring the identification, discussion, and implementation of those legal doctrines essential to evolving missions in the field.

54. See, e.g., H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, ARMY LAW., July 1983, at 1; James A. Burger, *International Law- The Role of the Legal Advisor, and Law of War Instruction*, ARMY LAW, Sept. 1978, at 22; William H. Parks, *The Law of War Advisor*, 31 JAG J. 1 (1980).

55. See GERHARD VON GLAHN, *LAW AMONG NATIONS* (1986). The law of armed conflict is drawn from several sources including international agreement, custom and practice, judicial decision, and general principles of law.

56. But see Fredrick A. Graf, *Knowing the Law*, PROC., June 1988, at 58. If the record of the U.S. military is measured against the actual rules, and not against its adversaries, it has "been far from perfect."

57. "That body of law, both domestic and international, impacting upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments." David E. Graham, *Operational Law: A Concept Comes of Age*, ARMY LAW, July 1987, at 9. See also Jeffrey F. Addicott, *Operational Law Note: Proceedings of the First Center for Law and Military Operations Symposium*, ARMY LAW., Dec. 1990, at 47.

In terms of providing training of international human rights issues to U.S. personnel, judge advocates are an integral part of an educating and reporting system. Under this system, American soldiers are taught to focus on identification of conditions or actions which may constitute gross violations of internationally recognized human rights and proper reporting mechanisms of those violations. Paragraph 13-3, Army Regulation 12-15, Joint Security Assistance Training, contains a list of the key violations which U.S. soldiers should be able to recognize. These violations mirror those found in Common Article III of the Geneva Conventions:

- (1) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment, and torture;
- (2) taking hostages;
- (3) outrages upon personal dignity, in particular, humiliating and degrading treatment; and
- (4) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁵⁸

All U.S. soldiers are obligated to report through military channels human rights violations they become aware of in accordance with Army Regulation 12-15. These reports are forwarded to the State Department. At the same time, U.S. soldiers are instructed that they are not to place themselves in a position of investigating human rights violations. The primary role is to report violations. When deployed to the soil of a foreign nation, U.S. soldiers have no legal basis to do more than to report the violation to U.S. authorities. Still, the message that gross human rights violations are of grave concern to the United States is communicated to the host nation military at every opportunity.

The most challenging and novel OPLAW mission for U.S. military judge advocates is to provide assistance to the militaries of the new democracies, to define how the rule of law should fit into their military establishments, and how the military itself should properly function *vis a vis* a democratic form of government. Because one of the most critical components of any democratically based military organization is the function of the law, U.S. judge advocates have responded favorably to requests for assistance in restructuring. In short, U.S. judge advocates have expanded their mission of providing legal support to their own military, to providing assistance in various law-based institutional development projects in the militaries of other nations.⁵⁹

The primary concern for U.S. judge advocates rests with how, over the long-term, the host nation military can be encouraged to accept a reduced and more professional role appropriate to a democracy. But even apart from direct institutional development assistance, U.S. judge advocates have been used to open channels of communication and to establish an information presence with

58. Paragraph 13-3, Army Regulation 12-15, Joint Security Assistance Training.

59. Matthew E. Winter, *Finding the Law- Values, Identity and Function of the International Law Adviser*, 128 MIL. L. REV. 1, 6 (1990).

scores of new democracies.

A successful strategy to achieve these democratization goals must be based on three clearly focused themes directed to the host nation military and appropriate civilian government officials:⁶⁰

- (1) instilling a greater respect for internationally recognized standards for human rights;
- (2) fostering greater respect for and an understanding of the principle of civilian control of the military; and
- (3) improving military justice systems and procedures to comport with internationally recognized standards of human rights.

One of the major obstacles to conducting legal assistance projects is that many of these emerging and struggling democracies are typically faced with the social and economic problems traditionally associated with lesser developed countries, ranging from economic chaos to actual armed insurgency. Thus, the effectiveness of any assistance program must be measured against the realities associated with the specific problems facing the host nation.

To better coordinate all of the *ad hoc* U.S. military legal support that is currently being provided to emerging democracies, the Judge Advocates General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, signed a memorandum of understanding (MOU) in May 1993, which established an "Inter-Service Committee on International Legal Education."⁶¹ The purpose of the Committee is to act as a "single reception point for proposals and requests for educational exchanges and programs" so that needless overlap and duplication of effort will be eliminated. The Committee is responsible for planning, programming, and budgeting all U.S. judge advocate activities, which are currently handled by several single service programs. The Committee is composed of one senior judge advocate from each of the three services and is chaired by one of its regular members, with the role of chairman rotating among the services every two years. The Committee is charged with four responsibilities.

The first responsibility is to form a strategic plan based on the various assets at hand so that joint training, planning, and reporting standards are established for program participants. The second responsibility is to receive feedback on completed programs, plan follow up contacts, and cross-feed information to the services, to assist in assessing future needs for a particular foreign military. This is being accomplished through a data base to capture teaching materials and lessons learned from each mission performed under the auspices of the Committee. The third responsibility is to develop a plan to maximize the use of all available DoD funds efficiently, limit overlap, and

60. See Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961), amended by 22 U.S.C. § 2347 (1976), which provides the authority for security assistance under the International Military Education and Training (IMET) program. These goals are taken from Title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1991, Pub. L. No. 101-513, 104 Stat. 1991 (1991).

61. On file with International & Operational Law Division, Office of The Staff Judge Advocate, U.S. Army, Pentagon.

prioritize programs. The fourth responsibility is to prepare proposals for submission to the various funding sources such as the Traditional CINC Activities Fund,⁶² Secretary of the Army Latin American Cooperation Fund,⁶³ and International Education and Training.⁶⁴

The success of the Committee depends upon a fully integrated, truly joint approach to planning, programming and budgeting. In coordination with appropriate U.S. agencies, the Committee determines the needs of each contact foreign military, prioritizes those needs, identifies the appropriate funding source, decides the appropriate service representation of each proposed project, and submits proposals to the appropriate funding agencies. The result of these activities is a joint long-range plan that delivers a coherent program of military legal training and exchange worldwide.

While legal conferences and information exchanges are important first steps in the process of helping these militaries, the most promising approaches are the long-term efforts designed to institutionalize the appropriate values into the fabric of the host nation military. Thus, in terms of human rights training, the concept must be made an institutional element to act as a restraint within the system. Only in this manner can real systemic change be made. Accordingly, the centerpiece of any meaningful assistance strategy must shift from targeting people in the host nation to focusing on institutional development. If internationally recognized human rights are institutionalized in the system, people in the system will be obligated to conform. On the other hand, a U.S. assistance program directed only at people will not change the system in which those people operate. To date, two of the most significant long-term legal assistance programs targeted at institutional development of basic human rights have been the U.S. Army's efforts with the militaries of Peru and Ukraine.⁶⁵ The paper will now review the Peru initiative to provide a concrete example of a human rights training program, that, while not perfect, achieved a great deal of success.

The Peru Human Training Initiative

*"This [Human Rights Handbook] is for use by all Military and Police Components which have the task of providing instruction to combatants."
Peruvian Joint Staff Directive 1992*

Systematic and measurable change from top to bottom occurred in the Peruvian military as a result of an in-depth program to institutionalize internationally recognized human rights in all branches of the armed forces. The lessons learned from this program can be extrapolated and applied to any nation serious about fundamental human rights training for their armed forces.

62. Traditional CINC Activities Fund (TCA), 10 U.S.C. § 168 (1994).

63. Secretary of the Army Latin American Cooperation Fund (LATM COOP), 10 U.S.C. § 1050 (1994).

64. International Military Education and Training (IMET), 22 U.S.C. § 2347 (1994).

65. See *Code of Conduct for Participants in Military Operations*, Kiev, Ukraine: Ministry of Defense of Ukraine, Lubava, 1995.

From 1992-93, at the request of the Peruvian military, a team of U.S. Judge advocates conducted an expansive effort with the Peruvian military to create a standardized methodology for institutionalizing a human rights training program in their military. For ten years, the Peruvians had been locked in a deadly power struggle with powerful terrorist groups who were determined to overthrow the government. Groups such as the Sendero Luminoso committed massive terrorist acts against thousands of civilians.⁶⁶ Sadly, in some instances, the Peruvian military had responded to the terrorists by engaging in gross violations of internationally recognized human rights to include torture and murder. The conduct of the military reached the point where the very legitimacy of the Peruvian government was in question.

Before the United States sponsored an assistance project, no system existed to provide training to Peruvian commanders or soldiers in the basic requirements of first-generation human rights. In addition, the investigative process for soldiers accused of human rights abuses was deficient. Clearly, Peruvian soldiers in the field had to be given adequate and meaningful human rights training if they were to be held accountable. This training had to be fully institutionalized into the very fabric of the Peruvian military to be effective. In short, this meant the training had to be mandatory for all soldiers on a continuing basis.

Working closely with the Peruvians, a basic training handbook for soldiers was developed. The handbook was pocket sized and entitled *Human Rights- The Ten Commandments for the Forces of Order*.⁶⁷ The handbook was adopted quickly by the Peruvian Joint Staff. A team of Peruvian lawyers and field officers were trained in how to teach the materials. In this "train the trainers" approach, the Peruvian instructors then conducted training for the entire military over the course of the next year.

The effectiveness of this program is shown by the associated dramatic decline in gross violations of human rights committed by the Peruvian armed forces. No one can deny that there has been a significant improvement in the Peruvian military's human rights record since the Fall of 1992. It is no coincidence that this improvement coincides directly with the Peru human rights initiative. The Peruvians have made tremendous strides not only in improving compliance, but also in actually punishing those accused of violations. While Peru still struggles against terrorist groups, the military has come a long way since 1992. For example, the National Coordinator of Human Rights in Peru reported little over 70 disappearances for 1993, down from almost 300 in 1992. United States estimates put the number of disappearances for 1993 at seventy-five.⁶⁸ "As of May 1994, the *Coordinadora* had documented 59 cases of enforced disappearance attributed to the Peruvian security forces- of whom 8 reappeared and 51 remained disappeared- and 35 cases of extrajudicial killings

66. SIMON STRONG, *SHINING PATH* 253-56 (1992).

67. On file with the office of the Staff Judge Advocate, U.S. Southern Command, Miami, Fla.

68. James Brooke, *18 Months Later, 10 Killings Haunt Peru's Army*, N.Y. TIMES, Jan. 12, 1994, at A3. The number of disappearances is set at 75 for 1993.

(including ten cases attributed to "rondas" collaborating with the military.)"⁶⁹

Extrajudicial killings by government forces have also declined dramatically since 1991. There were 133 reported cases, in 1991, 114 reported cases in 1992, and less than fifty reported cases in 1993. In contrast, the subversives were responsible for 903 assassinations in 1991 and 727 assassinations in 1992. The 1993 figures indicate the number of Sendero Luminoso assassinations reached over 900, with a great number of Sendero Luminoso victims often tortured to death.

Like any human endeavor, no program is free of fault. Based on conversations with officers in the Peruvian military, it appears there is less emphasis being placed on the Peru Human Rights initiative today, as compared to when the program was initiated in 1993. This weakening of attention and support could be explained by a number of factors, such as the significant reduction of military operations against terrorists and insurgents in Peru since the early 1990's. The Program could also be a victim of its own success, i.e., "the Peruvian Army no longer commits human rights violations, so no further training is necessary." Reasons for the diminishment of the program are subject to speculation. What is certain, however, is that the program continues to survive and provide valuable training to the Peruvian military.

PART IV

HUMAN RIGHTS TRAINING FOR THE POST-CASTRO CUBAN MILITARY

Sooner or later, an opportunity to engage the Cuban military in the area of human rights training will emerge and the United States must stand ready to offer appropriate assistance to the new Cuban government. Specific recommendations will be provided to serve as guidelines for the formulation of a U.S. Cuban military.

An Opening for Promoting Human Rights in the Post-Castro Military?

Although Cuban communist and military men will have a vested interest in maintaining power once Castro has departed, many analysts believe some degree of opportunity for sweeping change will open in the immediate aftermath of Castro's departure. Of course, how wide and far-reaching the opening will be is unpredictable. Because there is no person on the scene to project Castro's charisma or Castro's command, which gave him the absolute unquestioned loyalty of the military and helped keep him in power, it is probable that the new leadership will be obliged to introduce at least some political and economic reforms.

A revealing validation of the fact that there will most certainly be some opening for dramatic change in post-Castro Cuba occurred during remarks given by Pope John Paul II's visit to Cuba at an open-air mass in Havana's Plaza Jose

69. *Coordinadora* 1993 Annual Report, at 11-12. See also *After the Autogolpe: Human Rights in Peru and the U.S. Response*, The Washington Office on Latin America, July 1994, at 10.

Marti on January 25, 1998. A U.S. Congressional committee reported that when the Pope thanked Fidel Castro, who was seated in the front row, for his cooperation with the visit, the crowd of one million Cubans simply refused to applaud the dictator:

We looked around from our spot in the middle of the throng of one million. Over the loudspeakers, we heard tiny applause coming from the VIP section up front. But all around us, average Cubans stood silent. People looked first at their shoes, then each other. And then they began to snicker, as they suddenly realized what they had just done. With their silence, one million Cubans had just denounced the regime; . . . one million Cubans had just committed the largest "*act de repudio*" in the history of the Cuban revolution.⁷⁰

One positive trend that might prove useful for future direct military-to-military contacts between the armed forces of the United States and Cuba is the apparent desire by the Cuban armed forces to reach out to neighboring militaries for professional information sharing. Despite the massive reduction in the armed forces and the shift to the new inward missions, the military actively seeks to open channels of communication and to strengthen ties with many of its counterparts throughout the region. Cuban officers regularly attend military conferences and participate in subject matter expert exchanges with a large number of foreign militaries. If nothing else, this seems to reflect a desire to foster the image of a nationalistic military rather than a communist or revolutionary one.

While assistance to a new Cuban democracy will be needed at every possible level, correctly defining the role of the military is of utmost concern in the expected transition from totalitarianism to a liberal democracy. This is as true in Cuba as it is in any other emerging democratic nation. Keenly aware of the military's former place as the major power institution in Castro's system, one can expect that the Cuban military of the new ruling system will remain, at least in the short term, as a decisive factor in who governs. As is the case of many other emerging democracies, the military establishment has initially stood as the most stable organization of the new state. Herein lies the paradox, the Cuban military may be the strongest national institution to maintain stability in the immediate aftermath of Castro's departure, but because of its totalitarian background, it also presents a potentially dangerous threat to democratic reforms trying to take root.⁷¹ Thus, since the Cuban military will most certainly stand as a major power broker, the immediate target for reform must be in crafting a solid democratically based military establishment that respects internationally recognized human rights. More than any other aspect of promoting democratic institutions, the ethos of the military in this regard must be quickly developed.

70. *Id.* at 1.

71. Kathleen D. Valenzi, *Educating the World's Soldiers*, UVA LAW., Fall 1993, at 6 (quoting Major Andrew Warner).

For the post-Castro Cuban military, the chief legacy of the non-democratic past will be that they have no frame of reference for operating under principles associated with internationally recognized human rights and the rule of law. Coming out of a tradition in which the ruling elite of the totalitarian state maintained power by using special units of the armed forces as a primary instrument of repression against the people, the Cuban military itself was viewed as the chief abuser of human rights.⁷² The totalitarian Cuban state relied on components of the military establishment to maintain power and to suppress any threat- internal or external- by any means. Thus, human rights, the rule of law, and civilian control are alien concepts to Castro's military.

Institutionalization must be the criterion. Teaching a few human rights classes to a military audience is not a solution; human rights must be institutionalized through a systematic training program that provides the necessary inculcation. Without the institutionalization of human rights principles in the post-Castro military, it is probable that the armed forces will quickly respond to totalitarian voices should conditions turn sour. While desires for freedom will eventually destroy a totalitarian system, freedom and basic human rights are not self-perpetuating, and can only be sustained through the creation of concrete law-based institutions.

Specific Recommendations for a Human Rights Training Program for the Future Cuban Military

"I've seen the way that this country (the U.S.) operates and this is the way it should be."

Zaire military student

Apart from the incredible amount of hard work necessary to develop and implement a Peru-type human rights military training program, there are several lessons learned that can be used when developing a similar project for the post-Castro military. These lessons learned from the Peru program and others have been distilled into seven specific recommendations.

INSTITUTIONALIZATION OF THE PROGRAM: As demonstrated throughout the Peru initiative, any program designed to promote first-generation human rights values within foreign militaries must be built upon institutionalizing those values into the fabric of that force. Programs designed merely to have U.S. personnel teach human rights on one or more occasions will have limited long-term impact. Such limited programs will fail to instill pride and responsibility into the host military, which comes from designing and delivering their own human rights curricula for training.

This "train the trainers" approach is distinguishable from any other program because it assimilates the target country's military command structure at all stages of the process in the development of a course to train its own soldiers in basic human rights law. Thus, this approach provides the most promise for success because the target military is more likely to follow through

72. *Id.*

with programs in which its top military commanders have invested the necessary time and resources to develop. There is a direct positive correlation between the host nation viewing the program as an indigenous effort and the amount of real support that is provided.

COOPERATIVE PROGRAM, NOT U.S. DIRECTED COMMANDMENTS: Formal requests for this type of long-term assistance must always originate from the host nation government. If the desire is present, the requests need only be properly molded and then communicated through appropriate channels. The United States, along with other Latin American nations, international organizations such as the United Nations and the Organization of American States, as well as non-governmental organizations, working together, should encourage a post-Castro Cuban government to work with other militaries, including the U.S. military, to seek assistance in the Human Rights training arena. A request for assistance to the United States from the Cubans, however, should not be approached as to what the United States is going to do, but what the two nations together are going to do. In this manner, the host nation is engaged in the reform effort at the very beginning of the process. The lesson to apply in a future effort in Cuba is fundamental; only a unified U.S. team working together towards common long-term objectives will be able to launch and sustain a successful program.

OBTAIN THE SUPPORT OF THE SENIOR CUBAN POLITICAL AND MILITARY LEADERSHIP: Closely related to developing solid requests for long-term assistance from Cuba is the task of getting firm commitment for the end result—real programmatic change. Since the task of institutional reform may require a total restructuring of the current system, including the elimination of programs that are counterproductive, the complete cooperation of the senior leadership who set the political goals for the target nation is absolutely essential.

This commitment must be obtained as soon after an initial U.S. site survey as possible. Because of the expected window of opportunity in Cuba, this support must be quickly developed. In the case of Peru, not only did the most senior levels of the military pledge support, but the Peruvian President also promised his full commitment. As a practical matter, the Cuban commitment will only be as strong as the attendant coordination of that support through senior U.S. Representatives.

DEVELOP A CURRICULUM THAT RESPONDS TO THE NEEDS OF THE CUBAN MILITARY, NOT SIMPLY COPY A MODEL THAT HAS WORKED ELSEWHERE: Once Cuba has agreed to the concept of long-term reform, it is important that the U.S. working team not get too far out ahead in advocating that the Cuban military come up with the same "ten commandments of human rights" that were used in Peru, or copy other programs used in Ukraine, Colombia, and other places. Sensitivity is critical. Planners must take into account nationalistic and other characteristics peculiar to each military in developing a human rights curriculum. While the first-generation human rights contained in the handbook will be the same, they may be expressed and tailored in different ways. In addition, the U.S. assistance must be offered at a pace comfortable for the Cuban military. Institutionalizing these principles may not come easily to people long ruled by totalitarian systems. For instance, the U.S. team must be knowledgeable about the historical and political context in which they are

operating.

PLAN FOR THE PROPER FUNDING AND PERSONNEL RESOURCING OF THE PROGRAM: Army judge advocates designed and implemented the Peru initiative as an ad hoc additional duty to verify the concept of institutional assistance and to determine the logistical, administrative, and personnel requirements of such a program. The U.S. military now knows that the concept works well. With the right personnel and sufficient funding, a long-term assistance strategy for the Cuban military shows great promise. However, the U.S. military must plan now if it is to make the most of any Cuban requests for help. Estimates for funding should be developed along with the identification of potential judge advocates to execute the program. This latter point is particularly important because with adequate preparation time, the pre-designated judge advocates could begin to familiarize themselves with the situation in Cuba. With time, the pool of potential judge advocates to execute the program could be augmented, thus ensuring there would always be judge advocates ready to take action on short notice.

INCLUDE POLITICAL OPPOSITION GROUPS AND NON-GOVERNMENTAL ORGANIZATIONS IN THE PROCESS: As in all relations with foreign nations, one needs to be particularly sensitive to concerns from the opposite end of the domestic political spectrum in the host nation, especially in Cuba. In this vein, the possibility exists that opposition groups might seize on any U.S. assisted program as an opening wedge to advance their own anti-U.S. agenda. Efforts to include as broad a list of civilian participants as possible is helpful to defuse this potential problem. In Peru, the U.S. working team attempted to bring as many civilian human rights groups as possible into the overall process. This strategy should be followed in Cuba as well.

PROVIDE FOR QUALITY CONTROL, BOTH DURING INITIAL IMPLEMENTATION AND LONG-TERM: One of the distinctive characteristics of a long-term program is the need to stay engaged. Indeed, quality control mandates that the United States continue to monitor the program once it has been instituted. Measurable standards for positive advancement need to be developed. This can be done by counting the number of soldiers trained and by closely following further reports of gross human rights violations.

As demonstrated by the impressive drop in human rights violations since the implementation of the Peru program, institutionalization and continued engagement is key. It is essential that contacts be continued, to allow the institutionalization to grow from the roots. Planners for the effort in Cuba must understand that the program is not a "one-shot deal"; tracking the program is as critical as establishing the program. Finally, assisting the Cuban military in human rights must flow hand-in-hand with actions taken by the nation to promote its political, economic, and social growth in a manner that responds to the needs of society.

CONCLUSION

"The sacred rights of mankind are not to be rummaged for among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power."

Alexander Hamilton

If the U.S. military is going to offer realistic assistance in fundamental human rights reform in the post-Castro military, U.S. policy makers must be alerted to the necessity for developing an assistance program that can provide the fundamental benefits of institutionalization. By any standard of evaluation, the Peruvian initiative stands as a paradigm for a meaningful U.S. assistance strategy in Cuba. This program has no equal in simplicity, focus, and potential for positive change in the militaries of the new democracies.

In addressing the issue of promoting democratic reform in the new Cuba, the United States must focus on the empirical studies, which have conclusively demonstrated the murderous behavior of totalitarian governments. As Professor Rummel stated: "The way to end war and virtually eliminate 'democide' appears to be through restricting and checking power. This means to *foster democratic freedom*."⁷³ It is a simple fact that those militaries who truly abide by internationally recognized human rights will support and not threaten democratic development. In turn, healthy liberal democracies are less likely to resort to aggressive warfare to settle international disputes. Thus, it is clearly in the best interest of the United States to guide the militaries of other nations, such as Cuba, towards greater respect for basic human rights. The end of Castro's totalitarian system will offer a unique opportunity for the United States to help advance the peace and extend greater respect for internationally recognized human rights.

If the United States is serious about promoting peace, it is time to abandon the "show-case" approach to promoting human rights; teaching human rights classes does not answer the problem. Perhaps the teaching approach was sufficient for the Cold War era because there were no opportunities to do more than teach. However, in the post-Cold War era, teaching is not a sufficient answer to the requests for institutional human rights reform, which hopefully will surface in the aftermath of Castro's demise.

In a nutshell, an action plan for the post-Castro military would have the following goal and means of achievement:

Goal: To assist in institutionalizing internationally recognized human rights values and the concept of civilian control in the Cuban armed forces.

Achievement:

*assist in the development of a viable teaching curriculum and standard handbook on internationally recognized human rights for the

73. R.J. Rummel, *Power Kills; Absolute Power Kills Absolutely*, HAIKU INST. OF PEACE RES., Oct. 20, 1991, at 17.

Cuban armed forces;

- *assist in training a cadre of Cuban military instructors ("train the trainers approach") to deliver the curriculum to the Cuban soldiers;
- *obtain the necessary formal commitments through written regulation from the highest levels of the Cuban government and military to implement mandatory human rights training based on the curriculum and handbook for all military personnel; and
- *ensure the institutionalization of the human rights program within military by maintaining close professional contacts.

Finally, the development of such a human rights training program is not only a morally correct activity for the U.S. military to pursue, but given the never ending struggle to promote America's national security within the framework of a shrinking defense budget, the use of U.S. judge advocates is also an extremely wise use of limited assets. While the other non-traditional military activities directed at drug reduction, disaster relief, humanitarian assistance, and nation building reduce human suffering and misery at the individual level, assisting in the institutionalization of basic internationally recognized human rights in foreign militaries, such as Cuba's military, has the potential to directly reduce the threat of aggressive warfare. United States military attorneys must prepare now to be ready to work together with the new Cuban armed forces.